Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Revision of the Commission's Program Access Rules	)	MB Docket No. 12-68
	)	
News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control	)	MB Docket No. 07-18
	)	
Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al.	)	MB Docket No. 05-192

COMMENTS OF
THE ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES
and
THE NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION

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TABLE OF CONTENTS

SUMMARY

The prohibition against exclusive contracts for vertically integrated satellite cable programming or satellite broadcast programming between any cable operator and any cable-affiliated programming vendor should be retained in full for an additional five years. The underlying facts that led Congress to promulgate the exclusive contract prohibition, and twice led the Commission to extend it, have not changed. Data in the record clearly demonstrate that the number of vertically integrated networks have either remained stable or increased, when measured in the key categories of average prime-time ratings and regional sports networks. Absent an extension of the exclusive contract prohibition, vertically integrated programmers will retain the ability and incentive to engage in discriminatory behavior with respect to other MVPDs. This impedes competition in the video distribution market to the detriment of consumers.

Proposed alternatives to retention of the exclusive contract prohibition would be ineffective and fail to preserve competition in the video marketplace. First, reliance on other program access rules would be insufficient, as they have been demonstrated to be ineffective, and the complaint process is too protracted and costly, especially for small MVPDs. Second, lifting the exclusive contract prohibition on a "market-by-market" basis would be administratively problematic, as marketplace and technological changes continue to blur the distinctions between geographic markets. Third, partially sunsetting the exclusive contract prohibition would be excessively burdensome, as it would require a complainant to establish that a violation has occurred, a process that is demonstrably impractical.

Finally, the Commission should undertake a comprehensive reform of its program access rules. Reforms to retransmission consent and "good faith" requirements, among others, are

imperative to promote competition in the video marketplace. Reforms are also needed to counter the discriminatory effects of volume discounts that are unrelated to market conditions, and uniform price increases that convey a competitive advantage to vertically integrated programmers.

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I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO)[1] and the National Telecommunications Cooperative Association (NTCA)[2] (the Associations) hereby submit these comments in the above-captioned proceedings.[3]

[1] OPASTCO is a national trade association representing approximately 420 small incumbent local exchange carriers (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve approximately 3 million customers.

[2] NTCA represents more than 580 rural rate-of-return regulated telecommunications providers. All of NTCA's members are full service local exchange carriers and many of its members provide wireless, cable, Internet, satellite, and long distance services to their communities; each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended.

[3] *Revision of the Commission's Program Access Rules*, MB Docket No. 12-68; *News Corporation and The DIRECTV Group, Inc., Transferors, and Liberty Media Corporation, Transferee, for Authority to Transfer Control*, MB Docket No. 07-18; *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia*

Section 628(c) of the Communications Act of 1934, as amended (the Act) generally prohibits exclusive contracts for satellite cable programming or satellite broadcast programming between any cable operator and any cable-affiliated programming vendor (also referred to as vertically integrated programmers).[4] Congress determined that the exclusive contract prohibition would cease to be effective on October 5, 2002, unless the Commission found that it "continues to be necessary to preserve and protect competition and diversity in the distribution of video programming."[5] In two consecutive prior reviews, the Commission has found that extension of the exclusive contract prohibition has been necessary.[6]

The Associations urge the Commission to extend the exclusive contract prohibition in full for an additional five year term. The record shows that the basis for the Commission's prior conclusions regarding the necessity of retaining the prohibition remains intact. The record also demonstrates that alternatives to retaining the prohibition would be unworkable and would fail to preserve competition in the distribution of video programming. Furthermore, there is voluminous evidence in the record that, in addition to retaining the exclusive contract prohibition, it is necessary to comprehensively reform the Commission's program access rules in order to achieve the Congressionally-mandated goal of preserving competition in the video marketplace.

Communications Corporation (and subsidiaries, debtors-in-possession), Assignors, to Time Warner Cable Inc. (subsidiaries), Assignees, et al., MB Docket No. 05-192, Notice of Proposed Rulemaking (rel. March 20, 2012) (NPRM).

[4] NPRM, ¶2.

[5] 47 U.S.C. §548(c)(5).

[6] NPRM, ¶3.

II. THE EXCLUSIVE CONTRACT PROHIBITION SHOULD BE RETAINED IN FULL FOR AN ADDITIONAL FIVE YEARS

The NPRM seeks comment on whether to retain, sunset, or relax the exclusive contract prohibition.[7] The Commission has repeatedly found that absent this rule, vertically integrated programmers would retain the ability and incentive to discriminate against other multichannel video programming distributors (MVPDs).[8] Evidence in the record demonstrates that this ability and incentive remains today. The only effective and practical means to prevent this discrimination and the attendant harms it would cause to competition in the video market and to consumers is to retain the exclusive contract prohibition in full.

Data presented in the NPRM demonstrates that since the Commission last found the need to extend the exclusive contract prohibition, the negative impacts of vertical integration have not abated, and in fact have increased in certain respects. Appendix B of the NPRM shows that even though the percentage of satellite-delivered national programming networks with cable affiliations has decreased, seven out of the top 20 programming networks, as ranked by prime time ratings, are vertically integrated.[9] This figure is unchanged from when the Commission last extended the exclusive contract prohibition.[10] Similarly, seven out of the top 20 satellite-delivered national programming networks, as ranked by subscribership, are vertically integrated, up from six out of the top 20 in 2007.[11] Furthermore, the number of large cable operators that own programming has also risen during this time, from five to six.[12]

Notably, the NPRM recognizes that the increase in the number of vertically integrated regional sports networks (RSNs) is even more pronounced, having risen from 18 in 2007 to 31,

[7] NPRM, ¶21, ¶31.
[8] *Id.*, ¶3.
[9] NPRM, ¶34, citing Appendix B.
[10] *Id*.
[11] *Id.*.
[12] *Id.*, Appendix B, fns. 19-20.

not including high definition (HD) programming.[13] However, when HD programming is included, the number rises to 57, constituting a majority of RSNs nationwide.[14] This is all the more significant considering that the Commission has long recognized that RSN programming is non-replicable, making access to this content important to competition in the video distribution market.[15]

Taken together, these metrics illustrate that the underlying facts that led Congress to promulgate the exclusive contract prohibition, and twice led the Commission to extend it, have not changed. While the percentage of programming networks that are vertically integrated has declined, their absolute numbers have either remained stable or increased, especially when measured in the key categories of average prime-time ratings and RSNs. These circumstances reinforce the ability[16] and incentive[17] of vertically integrated programmers to discriminate against other MVPDs.

There is no basis to depart from the Commission's conclusion in the *2007 Extension Order* that access to satellite-delivered, cable-affiliated programming remains necessary for viable competition in the video distribution market.[18] Indeed, as the NPRM observes, the Commission found in the *Comcast-NBCU Order* that the loss of vertically integrated programming, especially marquee programming, would harm other MVPDs and reduce competition in the video distribution market.[19] Evidence in the record does not suggest a different conclusion with respect to content from other vertically integrated programmers.

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[13] *Id.*, ¶34.
[14] *Id.*, Appendix C, Table 1.
[15] *Id.*, ¶28.
[16] *Id*, .¶¶33-37.
[17] *Id.*, ¶¶38-43.
[18] *Id.*, ¶34.
[19] *Id.*, ¶35.

Vertically integrated programmers themselves clearly recognize the market power conveyed by must-have content. In one recent example, Philip Kent, Chairman of Turner Broadcasting System, was quoted in a press report stating that it is the goal of programmers to gain the leverage necessary to increase rates by making networks "undroppable."[20] This statement illustrates the stranglehold that vertically integrated programmers seek to exercise over marquee content, and why the exclusive contract prohibition should be extended in full. Until there is evidence in the record that shows that the ability and incentive to discriminate has been appreciably reduced, there is no reason to extend the exclusive contract prohibition for anything less than the five-year period the Commission has repeatedly found to be appropriate.[21]

The NPRM also inquires how a sunset or relaxation of the exclusive contract prohibition would affect consumers, competition, and the potential of new entrants in the video distribution market.[22] As exhaustively demonstrated in other proceedings,[23] small MVPDs are already facing discriminatory pricing and other significant barriers to obtaining content under reasonable terms and conditions, to the extent that they are increasingly *exiting*, rather than entering, the video distribution market. More than two dozen small MVPDs were forced out of the business between January 2010 and September 2011 alone.[24] Relaxing or ending the exclusive contract prohibition would exacerbate the discrimination encountered by small MVPDs, driving even

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[20] Josh Wein, *TBS Chief: Broadly Popular Must-Have Shows and Loyal Fans Critical To Fee Increases*, Communications Daily (June 1, 2012), pp. 10-11.
[21] Furthermore, retention of the exclusive contract prohibition would obviate the need to adjust necessary merger conditions set in the *Comcast-NBCU Order*; *see also* NPRM, ¶93, ¶¶94-96.
[22] NPRM, ¶32.
[23] *See, e.g.,* OPASTCO, NTCA, the Independent Telephone and Telecommunications Alliance (ITTA), the Western Telecommunications Alliance (WTA), and the Rural Independent Competitive Alliance (RICA) (collectively, rural LEC or RLEC) comments, MB Docket No. 07-269, pp. 4-11 (fil. June 8, 2011) (RLEC Video Competition comments); RLEC comments, MB Docket No. 10-71, pp. 6-9 (fil. May 27, 2011) (RLEC Retransmission comments); American Cable Association (ACA) comments, MB Docket No. 07-269, pp. 4-16 (fil. May 20, 2009).
[24] *See,* letter from Rich Fickle, President and CEO, National Cable Television Cooperative, to Chairman Julius Genechowski, MB Docket No. 10-71 (fil. Sept. 28, 2011).

more out of the market. And for the small MVPDs that remain, they would have even higher costs and/or fewer programming choices to offer consumers.

Importantly, these developments would negatively impact the broadband marketplace as well. The Commission has long recognized that there is an intrinsic link between a provider's ability to offer video service and to deploy broadband.[25] The Commission has the authority to consider its duty to encourage broadband deployment under Section 706 of the Act as part of its decision making process.[26] Retaining the exclusive contract prohibition will enhance broadband investment and deployment, in addition to furthering competition in the video distribution market.

Without this protection, non-integrated MVPDs and the customers they serve will bear the brunt of anticompetitive actions that vertically integrated programmers will continue to have the ability and incentive to engage in. As there is no reason to believe that the underlying problem will appreciably abate in the near future, the exclusive contract prohibition should be extended for the full five-year term contemplated by the Commission.

III. ALTERNATIVES TO RETENTION OF THE EXCLUSIVE CONTRACT PROHIBITION WOULD BE INEFFECTIVE AND FAIL TO PRESERVE COMPETITION IN THE VIDEO MARKETPLACE

In the event the Commission decides not to extend the exclusive contract prohibition, the NPRM considers whether competition in the video distribution market can be preserved and protected either by (a) relying solely on existing protections provided by the program access rules that will not sunset, (b) removing the prohibition on a market-by-market basis based on the

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[25] *See, e.g.*, *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 5101, 5132-33, ¶62 (2007). *See also*, *Exclusive Service Contracts for Provision of Video Services in Multiple Dwelling Units and Other Real Estate Developments*, MB Docket No. 07-51, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 20235, 20257-20258, ¶47 (2007).

[26] *USTA v. FCC*, 359 F.3d 554, 580, 583 (D.C. Cir. 2004). *See also*, RLEC Retransmission comments, pp. 4-5.

extent of competition in each market, or (c) retaining the prohibition only for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must have" programming.[27] As explained below, none of these alternatives would be an appropriate or effective remedy.

A. Other Program Access Rules Are Ineffective and Costly, Especially For Small MVPDs

The NPRM accurately points out that the Commission has previously found reliance on other program access rules to be "no substitute" for the exclusive contract prohibition.[28] A primary obstacle to relying solely on other program access rules that will not sunset is the demonstrable fact that all of the program access complaint procedures since passage of the 1992 Cable Act have proven to be protracted, costly, and ineffective. This is especially the case for small MVPDs.

Although the NPRM references two rare cases where complaints resulted in corrective actions,[29] the complainants (Verizon and AT&T) in these instances were very large MVPDs that were capable of bearing the enormous costs incurred and enduring the two-year wait entailed by the process. Furthermore, the NPRM recognizes that it is burdensome to require non-vertically integrated MVPDs to prove that the "purpose or effect" of an "unfair act" on the part of a vertically integrated programmer is to "significantly hinder or prevent" an MVPD from providing programming.[30] Small MVPDs in particular lack the resources to engage in these sorts

[27] NPRM, ¶46.
[28] *Id.*, ¶49.
[29] *Id.*, ¶48.
[30] *Id*.

of expensive, drawn out proceedings.[31] Thus, relying upon other program access provisions that will not sunset is simply an unrealistic avenue for relief for small MVPDs.[32]

B. Lifting The Exclusive Contract Prohibition On A "Market-By-Market" Basis Would Be Administratively Problematic

The proposal to remove the exclusive contract prohibition on a "market-by-market" basis based on the extent of competition in geographic markets[33] is as problematic today as it was when the Commission inquired about it in 2007, if not more so. Small MVPDs noted at the time that this approach would be administratively difficult.[34] The current proceeding offers no new approach that might remedy this challenge.

Furthermore, as small MVPDs also highlighted five years ago, technological and marketplace developments are rendering geographic market borders less relevant as consumers demand more control over how, when and where to view their content choices.[35] Specifically, the expanding penetration of broadband, over-the-top video services, and consumer cloud computing services, among others, enables viewers to access the programming of their choice regardless of location. This is accelerating the blurring of market borders, making elimination of the exclusive contract prohibition on a "market-by-market" basis even less viable today.

C. The Proposal To Partially Sunset The Exclusive Contract Prohibition Would Be Excessively Burdensome

Finally, the NPRM's proposal to retain the exclusive contract prohibition only for satellite-delivered, cable-affiliated RSNs and other satellite-delivered, cable-affiliated "must

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[31] As a further example, few instances of violations of the Commission's "good faith" negotiating rules have been challenged despite rampant breaches of these provisions. This is due to the impracticality of obtaining effective relief. *See* RLEC Retransmission comments, pp. 6-9.
[32] NPRM ¶96. *See also*, *e.g.*, RLEC reply comments, MB Docket No. 11-128, pp. 3-4 (fil. Sept. 26, 2011) (RSN reply comments); RLEC Retransmission comments, pp. 8-9.
[33] *Id.*, ¶¶69-71.
[34] OPASTCO, ITTA, WTA, and RICA comments, MB Docket Nos. 07-29, 07-198, pp. 3-4 (fil. Jan. 4, 2008).
[35] *Id.*

have" programming[36] would still likely cause small MVPDs to lose some competitively critical content, depending on how "must have" programming is defined. Also, the NPRM recognizes that demonstrating violations would again be burdensome under this proposal.[37]

The NPRM suggests that once a complainant succeeds in demonstrating that an exclusive contract for vertically-integrated content violates provisions of Section 628 of the Act, a rebuttable presumption could be established that any other exclusive contract involving the same network would also constitute a violation.[38] However, unless and until complaint procedures and program access reform rules undergo significant reforms,[39] the record shows that the costs and protracted burdens associated with bringing a complaint are so high as to render this solution impractical, at least for small MVPDs.[40]

As noted above, the Commission was, and remains, correct when it previously concluded that there is no substitute for the exclusive contract prohibition. A partial sunset of the rule, or rescissions of the rule on a market-by-market basis, are impractical and will not effectively preserve and protect competition in the video distribution market. Absent the streamlining of complaint procedures and the reform of program access rules, the only viable solution is to retain the exclusive contract prohibition in full.

IV. PROGRAM ACCESS RULES SHOULD BE REFORMED IN A COMPREHENSIVE MANNER

The NPRM seeks comment on how the Commission can improve its program access rules, which have remained largely static since they were adopted in 1993 despite myriad

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36 NPRM, ¶¶72-76.
37 *Id.*, ¶¶55-57.
38 *Id.*, ¶56. The NPRM does correctly suggest retaining the exclusive contract prohibition for satellite-delivered RSNs even if the rule is otherwise modified (¶75). In the event the Commission decides to weaken the prohibition by adopting a partial sunset, the Associations support retention of the rule for RSNs and other "must-have" programming at the very least.
39 *See* Section IV, *infra*.
40 *See* Section III. A., *supra*.

changes in the marketplace.[41] The Associations have provided voluminous comments in other proceedings on the need for various reforms to the program access rules.[42] The Associations have also requested that the Commission investigate the anticompetitive practices of video content providers, including vertically integrated programmers, and take steps to improve small MVPDs' access to video content at affordable rates and under reasonable terms and conditions.[43]

Among other necessary reforms, the Commission should prohibit programming vendors from engaging in content "tying" where small MVPDs are forced to pay for content they do not want in order to acquire programming they desire. This practice unnecessarily increases small MVPDs' costs and prevents them from offering their subscribers affordable service packages.[44]

The Commission should also immediately reform its outdated retransmission consent process. Under the current rules, broadcasters are able to abuse their market power with "take it or leave it" ultimatums and the threat of withholding programming. These abuses are compounded by small MVPDs' inability to obtain alternative content from other markets. The Commission should therefore strengthen its "good faith" negotiating rules which are often circumvented, and adopt other recommendations provided by the Associations in the retransmission consent proceeding.[45]

In addition, the NPRM specifically proposes to provide defendants with an additional 25 days (a total of 45 days, rather than 20) to respond to certain complaints in the event the exclusive contract prohibition were to sunset in whole or in part.[46] As noted above, program access complaint procedures are already so costly and protracted that even large MPVDs are

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[41] NPRM, ¶96.
[42] *See, e.g.*, RLEC Retransmission comments, pp. 3-26; RLEC Video Competition comments, pp. 4-9.
[43] RLEC Video Competition comments, pp. 5-9.
[44] *Id*., pp. 5-6.
[45] RLEC Retransmission comments, pp. 6-18, 21-26.
[46] NPRM, ¶97.

dissuaded from undertaking a formal complaint in most cases. Small MVPDs have found that delays of any type are often used as leverage by programmers that largely serve to frustrate and inconvenience consumers. Therefore, the 20 day deadline should remain in place.

A. Program Access Reforms Are Also Needed To Counter The Discriminatory Effects Of Volume Discounts And Uniform Price Increases

The NPRM seeks comment on whether program access rules adequately address potentially discriminatory volume discounts and, if not, how these rules should be revised to address these concerns.[47] As the NPRM notes, the Commission has received voluminous comments and data showing that non-cost based volume pricing is discriminatory and has a detrimental impact on competition in the MVPD market.[48] However, the NPRM also observes that the Commission has not received complaints regarding discriminatory discount pricing, and asks if the complaint process is too costly and time-consuming.[49] As discussed above,[50] particularly for small MVPDs the answer is yes,[51] which explains the lack of formal complaints despite the severity of the problem.

The NPRM also observes that the Commission has previously discussed the possibility that a vertically integrated cable operator could disadvantage its competitors in the video distribution market by raising the price of a network to all distributors (including itself) to a level greater than that which would be charged by a non-vertically integrated supplier.[52] The NPRM further states that the Commission has correctly determined that while a uniform price increase appears facially neutral in that it applies to all MVPDs equally, it has a disparate impact on MVPDs that are not affiliated with the vertically integrated programmer because the price

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[47] *Id.*,, ¶¶98-100.
[48] *Id.*, ¶98, fn. 335; see also RSN reply comments, p. 4.
[49] *Id.*, ¶100.
[50] *See* Sections III. A. and III. C., *supra*.
[51] RLEC Retransmission comments, pp. 6-9.
[52] NPRM, ¶101.

increase is not merely an internal transfer for the unaffiliated providers.[53] The Commission has also correctly surmised that as rival MVPDs would have to pay more for the programming, they would likely respond either by raising their prices to subscribers, declining to purchase the programming, or reducing marketing activities. The vertically integrated operator would then enjoy a competitive advantage, because the higher price for the programming that it would pay would be an internal transfer that it could disregard when it sets its own prices.[54]

The NPRM seeks comment on potential remedies to the anticompetitive effects of volume discounts and uniform price increases, noting that baseball-style arbitration has been used in certain merger proceedings.[55] While arbitration may be part of a solution, this process could be expensive and impractical for small MVPDs. As further suggested by the NPRM, a rebuttable presumption could be established whereby uniform price increases of a certain level could be deemed unfair.[56] The NPRM also discusses addressing uniform price increases on a case-by-case basis through Section 628(b) complaints.[57]

While all of these approaches have merit, corrective actions will remain problematic if non-disclosure provisions continue to be required by programmers in contracts as a condition for MVPDs to gain access to content.[58] These provisions prevent MVPDs from gauging the market value of the content they are seeking to obtain, thereby placing them at a significant disadvantage in the negotiation process, and also making if nearly impossible to prove discriminatory behavior.

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[53] *Id.*, ¶102.
[54] *Id.*
[55] *Id.*, ¶101.
[56] *Id.*, ¶100.
[57] NPRM, ¶102.
[58] *See*, *e.g.*, RLEC Retransmission comments, pp. 8-9, 16-17.

The problems of discriminatory volume discounts and uniform price increases should be addressed in a larger program access reform measure which, among other things, would modify the retransmission consent rules. The "totality of circumstances" standard, which allows the Commission to account for behaviors that are not necessarily considered *per se* violations under other rules, should also be expanded.[59] The discriminatory effects of volume discounts that are not related to marketplace considerations,[60] and of uniform price increases, should be among the factors considered under this standard.

Extending the exclusive contract prohibition is but one step out of many that are necessary to preserve competition in the video distribution market. Program access rules are currently unsuited to resolve various discriminatory behaviors by content providers, including vertically integrated programmers, that have negative impacts on consumers. Comprehensive reform of these rules is necessary and long overdue.

V. CONCLUSION

The record demonstrates that the exclusive contract prohibition should be extended in full for an additional five years. Absent this prohibition, vertically integrated programmers will retain the ability and incentive to discriminate against other MVPDs, to the detriment of the consumer benefits derived from competition in the video distribution marketplace.

Proposed alternatives to retention of the exclusive contract prohibition would be ineffective and fail to preserve competition in the video marketplace. Reliance on other program access rules is not a viable option, as current complaint procedures are protracted and costly, especially for small MVPDs. Likewise, lifting the exclusive contract prohibition on a "market-

[59] RLEC Retransmission comments, p. 18.
[60] *Id*.

by-market" basis would be administratively problematic, while the proposal to partially sunset the exclusive contract prohibition would be excessively burdensome.

Finally, program access rules, including retransmission consent and "good faith" regulations, should be reformed in a comprehensive manner. Reforms are also needed to counter the discriminatory effects of volume discounts unrelated to market forces, and uniform price increases which convey competitive advantages to vertically integrated programmers.

Respectfully submitted,

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